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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 792.

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased, *Petitioner,*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation, *Respondents.*

PETITION FOR REHEARING AND RECONSIDERATION AND BRIEF IN SUPPORT THEREOF.

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FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation, *Respondents.*

PETITION FOR REHEARING AND RECONSIDERATION.

To the Honorable Supreme Court of the United States:

Comes now the above named petitioner and petitions this Honorable Court for a rehearing of her petition for a writ of certiorari herein filed and a reconsideration of this Honorable Court's order herein under date of January 12, 1942, denying the petitioner a writ of certiorari and for grounds for this petition petitioner states:

I.

That the Supreme Court of the State of Oklahoma is the highest court of the State of Oklahoma in which a decision could be had.

II.

That the said judgment of the Supreme Court of Oklahoma, which petitioner seeks to have reviewed by certiorari, affirming the judgment of the District Court of Custer County, Oklahoma, was entered on June 10, 1941, and is set out verbatim at pages 207-212 of the printed Transcript of Record filed in this court, and that said judgment of affirmance became final when petition for rehearing was denied September 9, 1941, as set out in the Transcript of the Record at page 212.

III.

That the decision of the Supreme Court of Oklahoma is in direct conflict with the decisions of this court, the circuit courts of appeals and of the highest courts of other states.

IV.

That petitioner has been denied a right specifically set up and claimed in her petition (R. 3-9), arising under the Federal Safety Appliance Act, March 2, 1893, c. 149, Sec. 2, 27 Stat. 53 (45 U.S.C.A. Sec. 2), and Federal Employers' Liability Act, April 22, 1908, c. 49, Sections 1 to 8, 35 Stat. 64 (45 U.S.C.A., Sections 51 to 58), by the failure of the District Court of Custer County, Oklahoma, to properly declare the law and the failure of the Supreme Court of the State of Oklahoma to properly apply the law to the facts.

The questions involved herein are substantial in that the Supreme Court of Oklahoma has denied an asserted federal right on the basis of the facts having no support in evidence. *Postal Telegraph Co.* v. *City of Newport*, 247 U. S. 464, 38 S. Ct. 566, 62 L. ed. 1215; *Brady* v. *Terminal R. Ass'n of St. L.*, 303 U. S. 10, 58 S. Ct. Rep. 426, 82 L. ed. 614; *Jenkins* v. *Kurn*, 313 U. S. 256, 61 S. Ct. Rep. 934, 85 L. ed. 1193; *Steeley* v. *Kurn*, second case, 313 U. S. 545, 61 S. Ct. 1087, 85 L. ed. 1511; *Duncan* v. *Thompson*, No. 78, 62 S. Ct. Rep. 422, not yet officially reported.

V.

That the questions, and reasons therefor, entitling petitioner to relief from the judgment entered by the Supreme Court of the State of Oklahoma, through the inadvertence, mistake and oversight of counsel for petitioner, were not presented with sufficient clarity to enable this Honorable Court to grasp their significance.

Your petitioner respectfully submits herewith her brief in support hereof.

SALLIE ESSARY,
Petitioner.

By CLARENCE C. CHILCOTT,
Counsel for Petitioner.

Certificate of Counsel.

Clarence C. Chilcott, Counsel for Petitioner, in the above entitled cause hereby certifies that the above and foregoing petition for rehearing and reconsideration is presented in good faith and not for delay.

Dated at Kansas City, Missouri, this 5th day of February, 1942.

Clarence C. Chilcott,
Counsel for Petitioner.

SUPPORTING BRIEF.

SUMMARY OF ARGUMENT.

I.

The Supreme Court of the State of Oklahoma is the highest court of the state in which a decision could be had.

II.

The judgment rendered by the Supreme Court of Oklahoma in the case of petitioner versus Lowden, et al., was a final judgment.

III.

The decision of the Supreme Court of Oklahoma is in direct conflict with the decisions of this court, the circuit courts of appeals and the highest courts of other states, in holding that:

(a) There was no defect in the coupling device (R. 211);

(b) There was no causal connection between the failure of the coupler to operate and the death of decedent (R. 211);

(c) The instructions given in the case did not work a miscarriage of justice and were not palpably and prejudicially erroneous (R. 211); and

(d) That there was no evidence of jerking or jarring of the car upon which decedent was standing (R. 211).

IV.

That petitioner has been denied a federal right specifically set up and claimed by the failure of the District Court of Custer County, Oklahoma, to properly declare the law and by the failure of the Supreme Court of the State of Oklahoma to properly apply the law to the facts.

ARGUMENT.

I.

That the Supreme Court of the State of Oklahoma is the highest court in which a decision in the case sought to be reviewed could be had is shown by Sections 1 and 2, Article 7, Constitution of the State of Oklahoma, and Sec. 528, Oklahoma Statutes 1931, see Appendix "A." These constitutional and statutory provisions have been construed by the Supreme Court of Oklahoma in the cases of *Robertson* v. *Bozarth, District Judge,* 87 Okla. 102, 209 Pac. 742; *State ex rel. Attorney General* v. *Davenport,* 125 Okla. 1, 256 Pac. 340; *State ex rel. Attorney General Short* v. *Martin,* 125 Okla. 51, 256 Pac. 667, and *Dancy* v. *Owens,* 126 Okla. 37, 258 Pac. 879; and the court, in the latter case, in construing such constitutional and statutory provisions, said, l. c. 822:

> "It must appear clear that there is only one Supreme Court; that all other courts (we do not refer to the state senate as a court; it is not so referred to in the Constitution except when it sits as a court of impeachment) are inferior to the Supreme Court; and that the Supreme Court is given a general superintending control over all."

II.

The said judgment of the Supreme Court of Oklahoma affirming the judgment of the District Court of Custer County, Oklahoma, became a final judgment upon the overruling of petitioner's motion for rehearing which it entertained and passed upon September 9, 1941 (R. 212), *C. G. W. R. Co.* v. *Basham,* 249 U. S. 164, 39 S. Ct. 213, 63 L. ed. 534, as a judgment of affirmance as construed by the Supreme Court of Oklahoma is a final judgment. This was held in the case of *Annis* v. *Bell,* 10 Okla. 647, 64 Pac. 11, l. c. 13, where it said:

> "The action taken in the probate court was but one of the steps necessary to be taken to determine whether she was a creditor or not. The final decision of this was in the hands of the Supreme Court."

Also see the case of *Noble, et al.* v. *Okla. City,* 172 Okla. 181, 44 Pac. (2) 135; certiorari granted 296 U. S. 560, 56 S. Ct. 134, 80 L. ed. 395; reversed and remanded 297 U. S. 481, 56 S. Ct. 562, 80 L. ed. 816. It left nothing to the discretion of the trial court, *Georgia Ry. & Power Co.* v. *Decatur,* 262 U. S. 432, 43 S. Ct. 613, 67 L. ed. 1065. *C. & O.* v. *McCabe,* 213 U. S. 207, 29 S. Ct. 430, 53 L. ed. 765. The trial court was thereby deprived of all jurisdiction to further proceed in the cause and the Supreme Court of the State of Oklahoma had exhausted its jurisdiction.

III.

(a) The Supreme Court of Oklahoma held (R. 212):

> "The evidence wholly fails to show that the coupler operated by Morgan was defective."

This holding is in direct conflict with both federal and state courts, which have construed an inoperative safety appliance (coupler) to be defective within the meaning of the Safety Appliance Act.

Minneapolis & St. L. R. Co. v. *Gotschall,* 240 U. S. 66, 67, 37 S. Ct. 598, 61 L. ed. 995. *Minneapolis, St. P. & Ste. St. Marie R. Co.* v. *Popplar,* 141 N. W. 798; aff. 237 U. S. 369, 370, 35 S. Ct. 609, 59 L. ed. 1000. *C. B. & Q.* v. *U. S.,* 220 U. S. 559, 55 L. ed. 582, 31 S. Ct. 612. *C. R. I. & P.* v. *Brown,* 229 U. S. 317, 320, 33 S. Ct. 840, l. c. 841, 57 L. ed. 1204. *Spokane & I. E. R. Co.* v. *Campbell,* 241 U. S. 497, 505, 36 S. Ct. 683, 60 L. ed. 1125. *Anderson* v. *B. & O. R. Co.,* 89 Fed. (2d) 629, l. c. 630; cert. den. 302 U. S. 696, 50 S. Ct. 14, 82 L. ed. 17. *D. T. & I. R. Co.* v. *Hahn,* 47 Fed. (2d) 59; cert. den. 283 U. S. 842, 51 S. Ct. 489, 75 L. ed. 1452. *Auchenbach* v. *P. & R. R. Co.,* 8 Fed. (2d) 350; cert. den. 273 U. S. 761, 71 L. ed. 878, 47 S. Ct. 476. *Didinger* v. *Penn. R. Co.,* 39 Fed. (2d) 798. *C. & O. R. Co.* v. *Gowen,* 65 Fed. (2d) 260. *P. & R. Co.* v. *Eisenhart,* 280 Fed. 271; cert. den. 260 U. S. 723, 43 S. Ct. 13, 67 L. ed. 482. *Anderson* v. *C. & O.,* 263 Ill. App. 609; aff. 186 N. E. 185, l. c. 187; cert. den. 290 U. S. 675, 54 S. Ct. 93, 78 L. ed. 583. *Stewart* v. *Walsh,* 182 N. W. 496; cert. den. 257 U. S. 641, 42 S. Ct. 52, 66 L. ed. 412. *Davis* v. *Minneapolis & St. L. R. Co.,* 159 N. W. 802; cert. den. 242 U. S. 650, 37 S. Ct. 243, 61 L. ed. 545. *C. I. & L. R. Co.* v. *Stierwalt,* 153 N. E. 807; cert. den. 278 U. S. 633, 49 S. Ct. 32, 78 L. ed. 551. *Talbert* v. *C., R. I. & P. Ry. Co.,* 284 S.

W. 499. *Talbert* v. *C., R. I. & P. Ry. Co.*, 15 S. W. (2d) 762; cert. den. 280 U. S. 567, 50 S. Ct. 26, 74 L. ed. 621. *McAllister* v. *St. L. Merchants' B. T. Ry. Co.*, 25 S. W. (2d) 791. *Henry* v. *C. C. L. & St. L. R. Co.*, 332 Mo. 1072, 61 S. W. (2d) 340, l. c. 341. *Kimberling* v. *Wabash*, 337 Mo. 702, 85 S. W. (2d) 736, l. c. 738. *Wilson* v. *Thompson*, 345 Mo. 311, 133 S. W. (2d) 331.

(b) The Supreme Court further stated (R. 211):

> "There is in the record no evidence • • • tending to show that anything connected with that operation (failure of the coupler to work) could have occasioned or contributed to the fall of Essary from the car."

This holding of the Supreme Court of Oklahoma is in direct conflict with the cases of *Choctaw* v. *McDade*, 191 U. S. 64, 48 L. ed. 96, 24 S. Ct. 24; *Myers* v. *Pittsburg Coal Co.*, 233 U. S. 184, 34 S. Ct. 559, 58 L. ed. 906; *N. Y. C. R. Co.* v. *Marcone*, 281 U. S. 345, 50 S. Ct. 294, 74 L. ed. 892; *B. & P. Ry. Co.* v. *Landringhan*, 191 U. S. 461, 24 S. Ct. 137, 48 L. ed. 262.

In all of these cases the evidence of proximate cause connecting the negligence or defect with an injury or death was far less satisfactory than herein, yet this court permitted a recovery. The subject of proximate cause is treated fully under Point III of petitioner's original brief, pages 23 to 42, and the court is respectfully referred thereto for additional cases in conflict with the holding of the Supreme Court of Oklahoma.

(c) The Supreme Court of Oklahoma held (R. 211) that "while the instructions in the instant case were * * * in many respects conflicting and confusing" that they sufficiently advised the jury the correct principles of law to be applied to the facts in the case, see Point IV, pages 42 to 47 of original brief.

While this subject was not treated exhaustively in petitioner's original brief, petitioner believes that sufficient is shown for this court to declare that petitioner was deprived of her rights under the Federal Safety Appliance and Employers' Liability Acts by the instructions of the court.

From a reading of these instructions a lawyer could not glean the law, much less a layman, and under them it is absolutely impossible for a jury to know what the law is, what law to apply to the facts or how to apply it, and the giving of these instructions defeated the purpose of the Safety Appliance and Employers' Liability Acts.

The Supreme Court of Oklahoma in this case admitted that the instructions were conflicting and confusing and a cursory reading of the same demonstrates they were misleading and improper and that plaintiff's claimed deprivation of a federal right is not frivolous, but substantial. *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 35 S. Ct. 481, 59 L. ed. 777.

This court will review on certiorari and reverse and remand a cause where the instructions submitted a wrong standard of liability. *B. & O.* v. *Groeger*, 226 U. S. 251, 45 S. Ct. 169, 69 L. ed. 419. In this case the court informed the jury that the respondent could rely upon the common law defenses of contributory negligence and as-

sumed risk which brings the case within the purview of this court and is reversible error. *So. Ry. Co.* v. *Crockett*, 234 U. S. 725, 34 S. Ct. 897, 58 L. ed. 1564; *C. & O. Ry. Co.* v. *John J. D'Atley*, 241 U. S. 310, 36 S. Ct. 564, 60 L. ed. 1016.

(d) The Supreme Court of Oklahoma held that (R. 211):

> "Assuming that the jury might reasonably draw from the evidence an inference that the coupler was defective, they must go further and infer that the defect in the coupler caused a jerking or jarring of the car upon which Essary was standing and that such jerking or jarring of the car caused or contributed to his fall. This would be pure conjecture or speculation and is not permissible."

Petitioner submits that such are not the facts and that the circumstantial evidence shows that a jerk or jar would be caused by the stoppage of the cars sufficient to throw a man not expecting it therefrom. However, there is direct evidence that such stoppage would cause a jerk or a jar sufficient to throw a man therefrom, which was testified to by witnesses Harrell (R. 83, 88) and Dodd (R. 108), and such expert testimony is substantial, see cases cited on page 25 of our original brief and the cases of *Gila Valley Globe & N. Ry. Co.* v. *A. J. Lyon*, 203 U. S. 465, 27 S. Ct. 145, 51 L. ed. 276; *Eugene C. Kreigh* v. *Westinghouse, C. K. & Co.*, 214 U. S. 249, 29 S. Ct. 619, 53 L. ed. 984. Furthermore, the Supreme Court of the State of Oklahoma takes judicial notice that the stopping of a freight train is attended with more or less of a jerk or jar. *M. K. T.* v. *Taylor*, 170 Pac. 1148, l. c. 1151.

Morgan testified (R. 166) that he made arrangements with decedent to shunt the cars down the main line. "Shunt" according to Webster's International Dictionary, means "to cause to move suddenly; to give a sudden start; to shove." It is common knowledge that when switchmen shunt a cut of cars they start the movement, stop the engine and cut off the cars, and to say there would be no stoppage sufficient to cause a man not expecting it to lose his balance and fall off the cars if they were not cut off and instead stopped with the rest of the train, would be flying in the face of physical facts.

It must, necessarily, therefore, be concluded that no inference was piled upon inference and that there was no hiatus between the cause and effect in this case.

SUMMATION.

In the case of *N. Y. C. R. Co.* v. *Winfield,* 244 U. S. 147, 37 S. Ct. 546, this court said, l. c. 547:

> "And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states. House Report No. 1386 and Senate Report No. 460, 60th Cong., 1st Sess. Thus, in the House Report it is said: 'It (the bill) is intended in its scope to cover all commerce to which the regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees . . . A Federal statute of this character will supplant the

numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the states.' "

This court will grant certiorari where it appears that there is a conflict of decisions between a federal court and a state court, *Tipton* v. *A. T. & S. F.*, 298 U. S. 141, 56 S. Ct. Rep. 715, 80 L. ed. 1091; *Palmer Clay Products Co.* v. *Brown*, 297 U. S. 227, 56 S. Ct. 450, 80 L. ed. 655.

To resolve a conflict between two circuit courts of appeals, *Wayne United Gas Co.* v. *Owen Ill. Glass Co.*, 300 U. S. 29, 57 S. Ct. Rep. 382, 81 L. ed. 557.

Where improper instructions were given, *B. & O.* v. *Groeger*, 226 U. S. 251, 45 S. Ct. 169, 69 L. ed. 419.

The fact that a federal right has been denied by a state court is sufficient to invoke the jurisdiction of the Supreme Court of the United States, *St. L. S. F. & T. R. Co.* v. *Seale*, 229 U. S. 156, 33 S. Ct. 651, 57 L. ed. 1129.

Where the state court denied asserted federal rights on a basis of fact having no support in the record, a finding of fact by the state court is not conclusive on this court and it should review and correct the error, *Postal Telegraph & C. Co.* v. *City of Newport, Ky.*, 247 U. S. 464, 38 S. Ct. 566, 62 L. ed. 1215.

This court is not bound by finding in a state court contrary to uncontradicted evidence, *B. & O. Southwestern* v. *Burtch*, 263 U. S. 540, 44 S. Ct. 165, 68 L. ed. 433. In the case of *N. Y. C.* v. *Marcone*, 281 U. S. 345, 50 S.

Ct. 294, 74 L. ed. 892, this court allowed a writ of certiorari on the ground that the court below had erroneously decided there was evidence that at the time of the accident deceased was engaged in interstate commerce; that there was evidence of negligence on the part of petitioner and that deceased's death was not due to his own negligence.

In a number of recent cases this court has held that it will issue its writ of certiorari to review the evidence and determine whether or not a federal right has been denied by a misinterpretation of or wrong conclusion drawn from the evidence, *A. T. & S. F.* v. *Saxon*, 284 U. S. 458, 52 S. Ct. 229, 76 L. ed. 397. *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. ed. 743. *Jamison et al* v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, l. c. 443, and this court will take jurisdiction on certiorari and review the evidence where the conclusion drawn by the highest state court would deprive a litigant of a federal right, *Brady* v. *Terminal R. Ass'n of St. L.*, 303 U. S. 10, 58 S. Ct. 426, 82 L. ed. 614, and will go behind the decision of a state court holding that the asserted federal right has no basis in point of fact. Otherwise it would almost always be within the power of a state court practically to prevent a review by this court, *Truax* v. *Corrigan, et al.*, 257 U. S. 312, 42 S. Ct. 124, 66 L. ed. 254. That is what the Supreme Court of Oklahoma has done in this case.

Unless the evidence is such that a court would be bound to set aside a verdict returned in opposition to it the evidence must be submitted to the jury for its consideration, *Marande* v. *T. & P. Ry. Co.*, 184 U. S. 173, 22 S. Ct. 340, 46 L. ed. 487. There was certainly sufficient evidence in this case to have sustained a verdict for petitioner had the jury returned a verdict for her.

In three recent cases this court has issued its writs of certiorari because the conclusions of the highest court of the state would deprive a litigant of a federal right under the Federal Employers' Liability Act. They are the cases of *Jenkins* v. *Kurn*, 313 U. S. 256, 61 S. Ct. 934, *Steeley* v. *Kurn*, 313 U. S. 545, 61 S. Ct. 1087 (reviewed without opinion upon the granting of the writ upon the authority of *Jamison et al.* v. *Encarnacion, supra*), and on the very day that this court denied the petition herein for a writ of certiorari this court decided the case of *Duncan* v. *Thompson*, 62 S. Ct. 442, not yet officially reported.

Conclusion.

It must be manifest that the decedent herein was killed as the result of one of two things for both of which the respondent would be liable, to-wit, either the switch foreman Morgan could not pull the pin by reason of an inoperative coupler, or he was negligent in giving a stop signal at a time when it was impossible to pull the pin and cut off the cars upon which decedent was riding. If the latter is the fact, then the case of *Ward* v. *C. R. I. & P.*, 68 Okla. 91, 173 Pac. 212; aff. 252 U. S. 18, 40 S. Ct. 275, 64 L. ed. 43, applies. If such is not the case and he was killed as the result of an inoperative coupler then the cases cited under Point III(a) do apply.

The question involved herein is quite similar to that involved in the case of *Brady* v. *Terminal Railroad Ass'n of St. Louis, supra*, where the Missouri Supreme Court denied the plaintiff a recovery against one railroad upon one ground, see *Brady* v. *Wabash*, 49 S. W. (2d) 24, and against the other railroad upon another ground, *Brady* v. *Terminal R. Ass'n of St. Louis*, 102 S.

W. (2d) 902, 903, thereby depriving the plaintiff, who was a railway employee operating under the Safety Appliance and Federal Employers' Liability Acts, of a recovery against either railroad and this court granted its writ of certiorari "in view of the importance of the question in the administration of the federal statute," 303 U. S. 10, 58 S. Ct. Rep. 426.

A similar question was involved in the cases of *Jenkins* v. *Kurn*, 313 U. S. 256, 61 S. Ct. 934, 85 L. ed. 851, which was reversed outright by the Supreme Court of Missouri, 144 S. W. (2d) 76, and *Kurn et al., Trustees* v. *Reece*, decided by the Supreme Court of Oklahoma, a copy of which opinion appears at page 30 of the petition for writ of certiorari in the Jenkins case. Reece was killed and Jenkins was severely injured in the same wreck. Reece's administratrix recovered and the judgment was affirmed and the Supreme Court of Missouri denied a recovery to Jenkins, and this court issued its writ of certiorari, Case No. 1, 312 U. S. 675, 61 S. Ct. Rep. 740, 85 L. ed. 1116, and reversed the Supreme Court of Missouri, 313 U. S. 256, 61 S. Ct. 934, 85 L. ed. 1316.

In Appendix "B" herein attached will be found the material testimony of the witnesses concerning the casualty in which petitioner's husband lost his life. There is not a scintilla of evidence of contributory negligence or assumed risk in the record. Any way the evidence is viewed decedent lost his life as the result of a breach of duty of the respondents or their employees, and, as stated in the case of Jamison, *et al.* vs. Encarnacion, unquestionably petitioner would be liable, as has been held by the Supreme Court of Oklahoma and this court (*C. R. I. & P.* v. *Ward*, 68 Okla. 91, 173 P. 212, aff. 252 U. S. 18, 40 S. Ct. 275, 64 L. ed. 43), if decedent's death had been

caused by mere inadvertence or carelessness upon the part of the offending foreman it would be more unreasonable and in conflict with the purpose of Congress to hold that respondent herein would not be liable for the much graver breach of duty in furnishing an inoperative coupler, when it would be liable for the mere negligence of the foreman as held in the Ward case.

Morgan had worked continuously as a railroad man for 44 years and for the defendants at Clinton for 10 years (R. 60-61), and to say that a man of his experience in charge of a switching crew would know when to pull the pin is unquestionable, *Philadelphia & R. Ry. Co.* v. *McKibbin*, 259 F. 476, l. c. 478, 479.

In this case the Supreme Court of Oklahoma went out of its way to make an alleged finding of fact for the purpose of declining to review the instructions which deprived the petitioner of a federal right. But this was improper, as held in the case of *Penn. R. Co.* v. *Jones*, 300 Fed. 525, l. c. 529:

> "We cannot assume something not conclusively shown by the record in order to conclude there was no prejudice from an erroneous instruction."

In fact, it is very doubtful if under the constitution, statutes (see Appendix A) and decided cases the Supreme Court of Oklahoma had any authority to make such an alleged finding of fact under the circumstances herein. It appears to be held that it has not. See *Shawnee Mutual Fire Ins. Co.* v. *School Board of School District No. 31, Grady County*, 44 Okla. 3, 143 Pac. 194, l. c. 195. *McDonald* v. *Strawn*, 78 Okla. 271, 190 Pac. 558.

It is, therefore, respectfully prayed that the order of this Honorable Court entered on the twelfth day of January, 1942, denying petitioner's petition for a writ of certiorari be vacated and that her petition for rehearing and reconsideration be sustained and the writ granted.

Respectfully submitted,

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